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No. 98-1836

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

UNITED STATES HEALTHCARE SYSTEMS OF PENNSYLVANIA, INC.,

Petitioner,

v.

PENNSYLVANIA HOSPITAL INSURANCE CO. AND THE COMMONWEALTH OF PENNSYLVANIA MEDICAL PROFESSIONAL LIABILITY CATASTROPHE LOSS FUND,

Respondents.

On Petition For A Writ Of Certiorari To The Pennsylvania Supreme Court

SUPPLEMENTAL BRIEF FOR PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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7PP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONCLUSION 4

TABLE OF AUTHORITIES

Page(s)

Cases

Herdrich v. *Pegram*, 170 F.3d 683 (7th Cir. 1999) 3

Pegram v. *Herdrich*, No. 98-1949 (to be argued Feb. 23, 2000) . . . . . *passim*

SUPPLEMENTAL BRIEF FOR PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Pursuant to Rule 15.8 of the Rules of this Court, petitioner submits this brief in response to the Brief for the United States as Amicus Curiae, filed December 17, 1999. Petitioner welcomes, and therefore will not respond to, the vast majority of the government's analysis.[1] In one important respect, however, petitioner disagrees with the government: the Court should grant the petition for a writ of certiorari outright, not hold this case pending its disposition of *Pegram* v. *Herdrich*, No. 98-1949 (to be argued Feb. 23, 2000).

This case presents an issue of ERISA preemption of a state-law negligence action against a health maintenance organization (HMO). *Pegram* presents an issue of fiduciary liability under ERISA for an HMO. As the government acknowledges (at 23), these issues are "fundamentally different."

The former subject has prompted huge amounts of litigation throughout the federal and state court systems, as is evident from the government's amicus brief in this case as well as petitioner's own submissions. See, *e.g.*, U.S. Br. 19-21 (collecting cases). "The profusion of litigation in the lower courts as to the extent of ERISA preemption with respect to activities by HMOs is further testament to the importance of the issues presented and the regularity with which they arise." *Id.* at 21. Fiduciary liability under ERISA for HMOs' administrative and medical decisions, by contrast, has been a

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[1] Although certain points of disagreement between the government and petitioner remain (*e.g.*, the government's assertion at 19 n.12 that the decision below is in conflict with only one prior decision of this Court, rather than three), those disagreements do not affect either the correct resolution of the case on the merits or its certworthiness, and therefore do not warrant further discussion at this stage.

subject of relatively infrequent litigation. The disparity is not surprising, given the incentives plaintiffs' counsel have to seek much larger recoveries under state tort law than are typically available under ERISA's remedial provisions.

The government contends (at 22) that "there is a connection between [some of the] allegations * * * in *Pegram* and the allegations in this case," and that there is a significant chance that this Court will effectively resolve the preemption issue in this case in the course of its reasoning concerning the fiduciary-duty issue in *Pegram*. If so, that is ***more*** reason, not less, why the Court should order full briefing and argument in this case. As the government acknowledges, and as the volume of litigation shows, the preemption issue is immensely important in practical terms. One need not gainsay the importance in its own right of the fiduciary-duty issue in order to recognize that the preemption issue should be decided in a case involving full briefing and argument on the merits of ***that*** issue, not incidentally in a case involving a different issue. Any possible bearing the preemption issue has on the Court's disposition of *Pegram* calls for a more careful consideration of the preemption issue in a case in which it is actually raised, rather than a disposition of *Pegram* while the present case is merely held. The Court can make a better informed judgment in ***both*** *Pegram* and this case if it has received full briefing and heard oral argument in both cases before rendering decision in either.[2]

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[2] Although *Pegram* is scheduled for argument in late February and the present case could not practicably be argued until April, the Court in the ordinary course of business would still likely have *Pegram* under submission at the time it heard argument in this case. Furthermore, of course, the Court controls its own docket and could choose to await the argument of this case, if doing so was appropriate in the Court's eyes, before rendering any decision in *Pegram*.

A threshold issue being raised in *Pegram*, and highlighted in the government's brief in this case, demonstrates the need for especially careful and informed decisionmaking in both cases. The *Pegram* petitioners (who include an HMO) are arguing that the "intended benefit" in an ERISA plan that provides medical benefits through an HMO is simply membership in the HMO, not the particular medical benefits to be provided by the HMO.[3] That argument, if accepted, would cause the *Pegram* petitioners to prevail in that case but, according to the government (at 22), would "likely" defeat preemption of the state-law claims in the present case and, presumably, in virtually all actions against HMOs. In light of the potential that such a ruling could have consequences far broader than may have been intended, the Court's institutional interests will be best served if it is fully informed of both the pros and the cons of adopting such a rationale. A grant of certiorari in this case, rather than a decision to hold it for *Pegram*, will best assure informative briefing.

A final reason why this case should not be held pertains to the uncertainty it engenders in the lower courts. As long as the Pennsylvania Supreme Court's erroneous opinion remains on the books, plaintiffs' counsel will give serious consideration to bringing state-law negligence claims against HMOs, even in circumstances in which the uniform body of federal law (see U.S. Br. 21) suggests that those claims would be preempted. Such litigation may result in a massive waste of resources, as plaintiffs cling to the gossamer hope that the views of the Pennsylvania Supreme Court will ultimately prevail before this Court and become the law of the land, and as HMOs defend actions that should not be brought against them in the first place (and litigate extensively over such collateral issues as removal of cases from state to federal

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[3] Judge Easterbrook advanced that argument in dissenting from denial of rehearing en banc in *Pegram*. *Herdrich* v. *Pegram*, 170 F.3d 683, 686 (7th Cir. 1999).

court under the "complete preemption" doctrine). That specter calls for the Pennsylvania Supreme Court's decision to be reviewed sooner rather than later. Under the government's proposed disposition of this petition, however, the Court might very well decide *Pegram*, conclude that it does not "fully dispose of the question presented in this case" (U.S. Br. 23), grant certiorari in this case, and then hear argument sometime next Term, with a decision unlikely before the year 2001. It would be unfortunate to allow the erroneous decision below to engender confusion and wasteful litigation for that entire time.

CONCLUSION

For the reasons stated by the government as well as those previously stated in the petition, reply brief, and supplemental brief, the petition for a writ of certiorari should be granted. For the reasons stated above, the grant of certiorari should not await this Court's disposition of *Pegram* v. *Herdrich*, No. 98-1949.

Respectfully submitted,

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